STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL RANT, Personal Representative of the Estate of LOIS RANT,

Plaintiff-Appellant,

v

SHEREE CLARK, MD, MIDMICHIGAN PHYSICIANS GROUP, ERNEST OFORI-DARKO, MD, and MIDMICHIGAN MEDICAL CENTER MIDLAND,

Defendants-Appellees.

UNPUBLISHED
October 19, 2006

No. 261615
Midland Circuit Court
LC No. 03-006886-NH

Before: Cavanagh, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

In this wrongful death claim, plaintiff appeals as of right the trial court order granting summary disposition in favor of defendants under MCR 2.116(C)(7). We affirm. This case is being decided without oral argument under MCR 7.214(E).

Plaintiff argues that his complaint was timely filed and that *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), should not be applied retroactively to his claim. We disagree with both assertions. We review de novo decisions regarding summary disposition motions. *Id*. at 647. Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by the statute of limitations. *Id*. We also review de novo whether a judicial decision should apply retroactively, whether a statute of limitations bars a claim, and questions of statutory interpretation. *Farley v Advanced Cardiovascular Health Specialists PC*, 266 Mich App 566, 570-571; 703 NW2d 115 (2005).

It is undisputed that the statute of limitations applicable to medical malpractice, MCL 600.5805(6), would have lapsed before plaintiff filed his claim. Plaintiff argues, however, that his notice of intent saved his claim under MCL 600.5856. It is now settled that although the notice-tolling provision in MCL 600.5856 can toll the statute of limitations generally applicable to medical malpractice, the tolling provision cannot toll the wrongful death saving provision

found in MCL 600.5852. *Waltz*, *supra* at 644. *Waltz* reasoned that the saving provision in MCL 600.5852 was not a statute of limitations or repose within the meaning of the tolling provision. *Id*. at 650-651.[1] Further, this Court recently held that *Waltz* applies retroactively in *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503; ___ NW2d ___ (2006).

Plaintiff attempts to distinguish both *Waltz* and *Ousley v McLaren*, 264 Mich App 486; 691 NW2d 817 (2004), arguing that both cases held only that claims brought under MCL 600.5852 would be time barred when the claims were brought five years after the claim accrued. Plaintiff further argues that neither case addressed whether the two-year period running from the issuance of letters of authority, MCL 600.5852, could be tolled by a notice of intent. However, this Court recently held that the *Waltz* holding applies retroactively to the two-year period found in MCL 600.5852. *Farley*, *supra* at 574. Accordingly, the trial court did not err in applying *Waltz* retroactively to this case.

Plaintiff next argues that MCL 600.5838a(2) expressly incorporates the wrongful death saving provision as a statute of limitations.[2] We hold that MCL 600.5838a(2) does not transform MCL 600.5852 into a statute of limitations. If the Legislature intended such a result, it would have provided as much. Also, MCL 600.5838a(2) does not use the phrase "statute of limitations," so plaintiff's assertion that it expressly provides that the wrongful death saving provision is a statute of limitations is without merit.

Plaintiff next argues that equitable considerations should bar retroactive application of *Waltz*. We review de novo the applicability of equitable doctrines. *Mazumder v Univ of Michigan Bd of Regents*, 270 Mich App 42, 49; 715 NW2d 96 (2006). Although this Court recently held in *Mazumder*, *supra* at 59,[3] that a claim determined to be untimely based on retroactive application of *Waltz* could be judicially tolled, plaintiff does not argue that judicial or equitable tolling should apply in this case. Instead, plaintiff argues that equitable principles should *preclude* this Court from retroactively applying *Waltz* to this case. Thus, this case is distinguishable from *Mazumder* because plaintiff does not request tolling of the statute of limitations, which is permissible under *Mazumder*, but asks us to not apply *Waltz* retroactively, which would be impermissible under *Ousley*.

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[1] Plaintiff relies on *Lentini v Urbancic*, 262 Mich App 552; 686 NW2d 510 (2004) to support his argument that the statute of limitations applicable to a wrongful death action does not begin to run until a personal representative had been appointed. However, our Supreme Court vacated this Court's opinion in that case. *Lentini v Urbancic*, 472 Mich 885; 695 NW2d 66 (2005).

[2] MCL 600.5838a(2) provides in pertinent part: "[A]n action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856 . . . . "

[3] *Ward v Siano*, 270 Mich App 584, 585; 718 NW2d 371 (2006), vacated in part 270 Mich App 801, declared a conflict with *Mazumder*. Thereafter, a special panel was convened under MCR 7.215(J) to resolve the conflict between that case and *Mazumder*, i.e., to consider whether equitable tolling would apply to cases time barred by retroactive application of *Waltz*. *Ward v Siano*, 270 Mich App 801; 718 NW2d 371 (2006).

Plaintiff also argues that applying *Waltz* retroactively violates the due process clause of the Michigan Constitution. Again, we disagree. Whether constitutional due process applies and, if so, has been satisfied are legal questions that we review de novo. *Reed v Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005). Plaintiff asserts that because *Morrison v Dickinson*, 217 Mich App 308, 317-318; 551 NW2d 449 (1996) established that a medical malpractice claim is a property right, *Waltz* cannot be applied retroactively because to do so would abrogate a vested property right. However, *Morrison* is inapplicable in this regard because *Waltz* neither extinguished the right to bring suit nor did it take away or impair vested rights acquired under existing laws. *Id*. at 317. Moreover, we have already rejected a similar argument in *Farley*, *supra* at 576 n 27 ("[B]oth *Waltz* and *Ousley* rejected constitutional challenges based on the notion that the *Waltz* decision shortened the two-year wrongful death saving provision, reasoning that the two-year period remained unaffected by the holding in *Waltz*.").

We affirm.

/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra
/s/ Donald S. Owens